pendently of the Constitution of the United States, belonging to that original legislative power which is vested in the people, which they never have delegated to the General Government, and which they have in the most general and unlimited manner committed to the several state legislatures.

J. H. T.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

THE PENNSYLVANIA RAILROAD CO. *v.* BOOKS.

In an action against a railroad company for injury caused by an accident, evidence that the conductor was intemperate or otherwise incompetent is admissible to raise a presumption of negligence.

Admissions or declarations of the employees of the company, made subsequently to the accident, are not competent evidence. Such declarations are only competent as part of the *res gestæ*.

The declarations of an officer of the company stand upon the same footing.

In an action for damages by a person injured by negligence, evidence of the number of plaintiff's family or of his habits and industry is not admissible unless special damage is averred.

It is no justification for the employment of an incompetent servant that competent ones were difficult to obtain.

Where a person injured by a railroad accident had accepted a ticket or pass describing him as "route agent, an employee of the Railroad Co.," this pass is competent evidence for the company, but it does not estop the plaintiff from showing that he was not, in fact, an employee of the company.

In an action for injury by negligence the damages should be compensation for the actual injury, and it is error to leave the measure and amount of damages, as well as the rules by which they are to be estimated, entirely to the jury.

WRIT of error to Common Pleas of *Snyder county*.

The plaintiff was a United States mail agent, employed by the Post-Office Department to take charge of mails on the cars of the defendant company.

While on the train an accident occurred by which he was injured, whereupon he brought an action upon the case for damages.

Plaintiff recovered a verdict, and defendant took this writ of error upon points which sufficiently appear in the opinion of the court.

Miller & Doty and *Cuyler*, for plaintiff in error.

Miller & Parker, for defendant in error.

The opinion of the court was delivered by

SHARSWOOD, J.—This was an action by the plaintiff below against the defendants, the plaintiffs in error, to recover damages for injuries alleged to have been occasioned by the negligence of their servants. Nine errors have been assigned, which it is our duty to consider.

The 1st is that the court erred in admitting testimony, touching the habits and competency of the conductor of a coal train, in the employ of the company, which had run into the passenger train and caused the injury. This assignment of error was not pressed, and properly. If by direct evidence it appeared that the conductor was a man of intemperate habits, it would cast upon the defendants the burthen of proving that he was not intoxicated at the time and had used proper care. It is certainly incumbent upon railroad companies to employ none but sober men on their roads. Where a habit of intoxication in a conductor is shown, it raises, in the case of an accident, a presumption of negligence, which stands until it is rebutted.

The 2d assignment of error is, that the learned judge erred in admitting evidence of statements of the flagman made subsequent to the accident. The plaintiff proposed to ask a witness if the flagman showed him how far he had gone back to flag the fast line. This was admitted, and an exception sealed. The rule is well settled, that what an agent says, while acting within the scope of his authority, is admissible against his principal, as part of the *res gestæ*, but not statements or representations made by him at any other time: *Shelhamer* v. *Thomas*, 7 S. & R. 106; *Levering* v. *Rittenhouse*, 4 Whart. 130; *Jordan* v. *Stewart*, 11 Harris 244. The admissions of an agent, not made at the time of the transaction, but subsequently, are not evidence. Thus, the letters of an agent to his principal, containing a narration of the transaction, in which he had been employed, are not admissible against the principal: *Hugh* v. *Doyle*, 4 Rawle 291; *Clark* v. *Baker*, 2 Whart. 340. Naked declarations, which are not part of any *res gestæ*, are mere hearsay, like words spoken by a stranger: *Patton* v. *Minesinger*, 1 Casey 393. The flagman himself was a competent witness, but his statement of what he had done was clearly

incompetent. There was error, therefore, in the admission of this evidence.

The 3d error assigned is in admitting evidence of statements made by the vice-president of the company. The plaintiff offered to ask a witness what Mr. Lombaert said about the railroad company receiving pay for carrying the mails. This was objected to, but the objection was overruled, and an exception taken. Declarations made by the officers of a corporation rest upon the same principles as apply to other agents. In a case where the admissions of the trustees of a religious corporation were offered in evidence, C. J. TILGHMAN said: "An agent is authorized to act; therefore, his acts, explained by his declarations during the time of action, are obligatory on his principal, but he has no authority to make confessions after he has acted, and, therefore, his principal is not bound by such confessions: *Magill* v. *Kauffman*, 4 S. & R. 321; *Spalding* v. *The Bank of Susquehanna County*, 9 Barr 28. So it has been ruled that in an action by a bank, evidence of the parol declarations of the officers of the bank is not admissible for the defendant, without proof of the particular officer's being authorized by the board of directors to speak for them, even though it should appear that the board kept no regular minutes of their transactions: *Stewart* v. *The Huntingdon Bank*, 11 S. & R. 267. In like manner declarations made by a person, who had been president of a bank, respecting payments made on a note, are not evidence against the bank: *Sterling* v. *The Marietta and Susquehanna Trading Co.*, 11 S. & R. 179; *Bank of Northern Liberties* v. *Davis*, 6 W. & S. 285. The decision in the case of *The Harrisburg Bank* v. *Tyler*, 3 W. & S. 373, does not conflict with these authorities—for the declaration of the cashier was received in that case as evidence that the bank had knowledge of a trust, and it was in the performance of those functions, which peculiarly belong to that officer in the current transactions of its business: *Hazleton Coal Co.* v. *Megargel*, 4 Barr 329. This assignment of error is, therefore, sustained.

The 4th error assigned is, that the learned judge erred in admitting evidence of the number of plaintiff's family, his habits, industry, and economy, as affecting the question of damages. In *Laing* v. *Colder*, 8 Barr 479, it was ruled, in a case of injury to the person, that damages sustained by the plaintiff, from the cir-

cumstance of his being the head of a family dependent upon him, have no necessary connection with the injury. Such damages may or may not follow a temporary bodily disability. Damages of this nature are, therefore, not direct or necessary, but special as being possible only, and must be specially averred to let in evidence of them. It is difficult also to see what bearing the plaintiff's habits, industry, and economy could legitimately have on the damages. They might be important in a proceeding under the Act of April 26th 1855 (Pamph. L. 309),[1] but in an action by the injured party himself they were irrelevant, and tended only to excite feelings of commiseration and sympathy in the breasts of the jurors, and to inflame unjustly the damages—results which in all actions of this character ought carefully to be avoided.

The 5th error is in excluding testimony offered by the defendants below touching the efforts made by them to secure competent train hands. We think the court was right in excluding this testimony. It was no justification or excuse to the company in employing an intemperate or incompetent man in a business involving such peril to life and limb, that hands were scarce. For a sufficiently high rate of compensation sober and competent men are always to be had. Such evidence, if admitted, would necessarily lead to collateral issues far wide of that on trial. We think there was no error in this ruling.

The 6th error assigned is in excluding from evidence the employee's pass, upon which the plaintiff was riding. The ticket produced was in these terms: "Employee's monthly pass. Pennsylvania Railroad Co. Pass S. Books, Route Agent, an employee of the Pennsylvania Railroad Company." The evidence offered was of course to show that the plaintiff accepted and used this ticket. It certainly was an admission by him that he bore to the plaintiffs in error the relation of an employee or servant. It was not indeed conclusive—not an estoppel—if explained so as to show that he was really not in the employ of the company, but, as was alleged, received and used the ticket as a route agent in the service of the post-office department of the government of the United States under a contract between that department and the company for carrying the mails. Standing alone, uncontradicted and unex-

[1] Action by widow or personal representatives for negligence causing death.

plained, the pass would have been sufficient to show that the relation existed between the company and the plaintiff stated on its face, and it was admissible no matter what evidence to the contrary had been previously given. The plaintiffs in error had a right to have the whole evidence go to the jury, as it would then have been a question for them, and could not have been shut out from their consideration, as it was by the judge in his answer to their 7th point. This assignment of error is therefore sustained.

The 7th error assigned is, that the learned judge erred in his instructions to the jury on the subject of damages, and in his answers on the same subject to the ninth and tenth points presented by the defendants below. After laying down a measure, which is not objected to here, and on which, therefore, we give no opinion, he added, "These we think would be fair rules to ascertain the measure of damages the plaintiff would be entitled to in this case; but if you can find any better ones than those suggested you are at liberty to adopt them, as the measure and amount of damages are entirely for you to ascertain, under all the evidence and circumstances in the case." The effect of this language was to leave the measure of damages entirely in the discretion of the jury. The general rule in actions on the case for negligence is that the party aggrieved is entitled to recover only to the extent of his actual injury. In the case of a suit by the party injured himself, it may no doubt include a reasonable compensation for pain and suffering, as well as the expense of medical attendance and the loss of time consequent upon confinement. But in these cases, as well as in those brought under the Act of April 26th 1855, unless the injury has been wantonly inflicted, when exemplary damages may be given, the jury must be confined to damages strictly compensatory. "Injuries to the person consist in the pain suffered, bodily or mental, and in the expenses and loss of property they occasion. In estimating damages, the jury may consider not only the direct expenses incurred by the plaintiff, but the loss of his time, the bodily suffering endured and any incurable hurt inflicted." Per BELL, J., in *Laing* v. *Colder*, 8 Barr 481. There was error therefore in this instruction.

The objection to the answer to the 9th point has not been pressed, and very properly. We see no error in it. The 10th point was "that if the court should be of opinion that plaintiff may recover, then the measure of damages would be the pecuniary loss he has sustained

in consequence of the injuries received." The answer was: "This is not the entire measure of damages you can give the plaintiff, if you believe this occurred from the gross negligence of the defendants' agents." The court might with more accuracy and propriety have simply negatived the point, for it was not true, whether the negligence of the defendants' agents was gross or otherwise. There is, therefore, no error in this answer of which the plaintiffs in error have any right to complain.

As to the 8th assignment of error, we think the learned judge was clearly right in his answers to the third, fourth, and fifth points presented by the defendants below. Every one riding in a railroad car is presumed *primâ facie* to be there lawfully as a passenger, having paid or being liable when called on to pay his fare, and the *onus* is upon the carrier to prove affirmatively that he was a trespasser. So as to the 9th error assigned, the employee's pass having been excluded, though we think improperly, there was no evidence that the plaintiff was an employee of the company.

Judgment reversed, and *venire facias de novo* awarded.

Supreme Court of Pennsylvania.

HAYCOCK, ADMR. OF SHIVE, *v.* GREUP.

When specimens of handwriting, admitted or proved to be genuine, are offered to prove by comparison the genuineness of the writing in issue, the comparison can only be made by the jury.

Such evidence is competent only as corroborative of other proof; it is not admissible as independent proof.

On an issue to determine the genuineness of a signature of A., specimens of B.'s writing in which the name of A. occurs are not competent independent evidence to prove by comparison that the signature of A. was written by B. Nor is the opinion of a witness that the signature was not written by A. any foundation for such proof that it was written by B.

Whether such testimony would be competent even in corroboration of other testimony that B. had written the signature in issue, doubted by STRONG, J.

A sealed special verdict so expressed as to be ambiguous may be reformed and moulded by the court in presence of the jury, without sending the jury out to reconsider it.

WRIT of error to the Common Pleas of *Lehigh county*.

Peter Shive, the defendant's intestate, made deposits in the